INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	3
Statement	5
Reasons for Granting the Writ	14
A. Where a United States Attorney has actual knowledge of material which is reasonably plainly helpful to the defense in preparation or trial, his failure to make disclosure to the defense should require a reversal, even in the absence of a wrongful motive to suppress such evidence or injure the defendant's rights. It is in the interests of the fair and even-handed administration of justice in the United States Courts to enunciate a clear rule for the guidance of prosecutors	14
B. The instruction under which the defendants were convicted and which was approved by the Court of Appeals permitted, indeed required, the jury to find the defendants guilty, even absent a dishonest or cheating intent, contrary to the well-established rule of this Court that the mental element of a crime must be determined by the jury	17
Conclusion	18

CITATIONS

Brady v. Maryland, 373 U.S. 83 (1963)	15
Brodie v. United States, 295 F.2d 157, 159 (D.C. Cir. 1961)	15
Griffin v. United States, 183 F.2d 990, 992-993 (D.C. Cir. 1950)	9

Page

Morrissette v. United States, 342 U.S. 246, 274, 276 (1952) 17
United States v. Kyle, 257 F.2d 559, 565 (2nd Cir. 1958) 12, 17
United States v. McFarland, 371 F.2d 701, 705 (2d Cir. 1967) 15
United States v. Polisi, 416 F.2d 573, 577 (1969) 15

Constitution of the United States:

Amendment V 3
Amendment VI 3

18 U.S.C. 371 5
18 U.S.C. 1341 ..... 3, 5
18 U.S.C. 1342 ..... 4, 5
18 U.S.C. 1621 5
28 U.S.C. 1254(1) 2

74 Yale L.J. 136, 145-47, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant .. 15

INDEX TO APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit 1a
Judgment of the United States Court of Appeals for the Second Circuit 10a
Opinion of the United States District Court for the Southern District of New York 11a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

SALVATORE BONANNO AND PETER NOTARO, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Salvatore Bonanno and Peter Notaro pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 28, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not officially reported and is reproduced at Pages 1a through 9a of the Appendix to this petition. The opinion of the United States District Court for the Southern District of New York (Mansfield, J.) has not been reported and is reproduced at Pages 11a through 22a of the Appendix to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 28, 1970, and is reproduced at Page 10a of the Appendix to this petition. By order dated August 17, 1970, Mr. Justice Harlan extended the petitioners' time in which to file a petition for a writ of certiorari to and including September 26, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of the prosecutor to disclose matters helpful and useful to the defense, and within his knowledge, in violation of defendants' right to due process, may be excused as harmless where it was not a deliberate act of suppression and where one of the theories on which the case was submitted to the jury was sustainable without reference to evidence which would have been affected by the required disclosure?

2. May a jury in a mail fraud case be properly instructed that it may return a verdict of guilt even if it concludes that defendants were acting under what they believed to be proper authority to use the credit of another and were acting without a fraudulent animus?

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18, UNITED STATES CODE, SECTION 1341.

Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of,

loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code, Section 1342.

Fictitious Name or Address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763.

TITLE 18, UNITED STATES CODE, SECTION 371.

Conspiracy To Commit Offense or To Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

STATEMENT

The petitioner Bonanno (who was sentenced to four years in prison and fined ten thousand dollars) was convicted of one count of conspiracy to commit mail fraud and fifty-two substantive counts of mail fraud (18 U.S.C. §§ 371, 1341, 1342) and two counts of perjury (18 U.S.C. 1621). Petitioner Notaro was convicted of the conspiracy and mail fraud counts but acquitted of a single count in the indictment which charged him with perjury. He was sentenced to one year's imprisonment and fined one thousand dollars.

The prosecution arose from the use by Bonanno and Notaro of the Diners' Club credit card of one Don A. Torrillo. The essential outline of the facts is set forth in the opinion of the Court of Appeals (Appendix to this Petition, pp. 1a-10a, at 2a and 3a). With the exception of one instance, the actual use of the card was

laid to Bonanno, and indeed there was no dispute that he had used the card; most of the evidence as to the use of the card went in by stipulation. The thrust of the prosecution was that the card had been obtained by one Perrone (since deceased) and the indictment charged that Perrone would "take, steal, extort and abstract" Torrillo's Diners' Club card (Count 1 of the indictment). The thrust of the defense was that the defenders believed themselves to be authorized by Torrillo to use the card, and that Perrone, who was a social and business acquaintance of Torrillo, as was Bonanno, had Torrillo's permission for Bonanno to use the card. Torrillo's credibility was accordingly of critical importance.

On initial cross-examination counsel had sought to press Torrillo about his questioning by the New York police (192).* Torrillo had been arrested and the charges against him dismissed. The prosecutor in a startling statement to the Court characterized them as "trumped-up" charges, saying that the police officers had come to Torrillo's home and arrested him on "three phony charges" (193). But it was the local police who turned their interview over to the postal inspectors. The Court ruled that the questioning was remote and speculative and counsel would be permitted to ask whether he was motivated by any desire to escape prosecution (196-197). Of course, simply asking a witness like Torrillo for his own description of his motivation is hardly the equivalent of examining him. If the matter had rested there the defendants would have suffered a serious deprivation in regard to their cross-examination. However, the Court had directed to be

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* Numbers in parentheses, unless otherwise indicated, refer to the stenographic minutes of the trial in the District Court.

turned over to the defense, notes transcribed from recordings which the local police had made during their interviews with Torrillo, and permitted Torrillo to be recalled for further cross-examination on those matters, and during that cross-examination Torrillo conceded that he had told the police that he really didn't know how the card was stolen (451), and made various other hedging and fencing statements (460-461). He persisted in his view that he was motivated by fear of the defendants and that his testimony was not the result of a desire to extricate himself or curry favor with prosecuting authorities.

Again and again counsel made it clear that Torrillo's motive in testifying was of first importance, e.g., pages 500, 195, and again and again Torrillo persisted in saying that his only fear was of the defendants:

> "A. As I said before, I was not in fear of being prosecuted for anything, Mr. Sadler, because I didn't do anything wrong. My main fear was motivated from the structure which I feared, will fear and always fear." (500)

Whatever success counsel had in other areas, their efforts to show a motive to testify from the fear of prosecution or punishment bore no fruit.

After the jury's verdict some striking information came to light. The jury returned its verdict on Friday, November 14th and all post-verdict motions were reserved until the day of sentence. By appointment, trial counsel and the prosecutor met with Judge Mansfield at the end of the day on November 19th and counsel for Notaro reported that on the previous Monday he'd encountered a lawyer who asked him whether the Torrillo who had testified in the case was the same Tor-

rillo who was under Indictment. Notaro's counsel then checked the records and found that there was a Torrillo indicted in a securities fraud case, and he desired to promptly inform the Court. The prosecutor then told the Court:

> "MR. PHILLIPS: I can verify, your Honor, that this Mr. Torrillo, the same Mr. Torrillo who testified in the trial last week, is under indictment in the Southern District for a security violation, and so I don't think that we need to go any further. It is the same man. I gather that the reason that Mr. Sandler is bringing this up is because he would have liked to have had that information last week in order to cross-examine Mr. Torrillo about it. I would naturally have objected to it since it would not be a felony conviction and therefore not proper to be brought up for impeachment purposes in cross-examination.
>
> It is only an indictment and it has not been brought to trial." (Proceeding of November 19, 1969, page 4).

After this conference with Judge Mansfield, written motions were filed returnable on December 30th. In connection with those motions, the prosecutor filed an affidavit from Torrillo indicating that he had encountered Bonanno's trial counsel outside room 318 of the Southern District Courthouse, which is part of the court where the criminal calendar is handled, and had indicated to Bonanno's trial counsel (who remains counsel on this petition) that he (Torrillo) had a problem arising from a securities case. Bonanno's counsel filed an affidavit in traverse of these allegations, concerning that he had encountered Torrillo, but denying any conversation or knowledge about a pending case against Torrillo. Judge Mansfield denied defendant's

motions for a new trial; his opinion is reprinted at pages 11a *et seq* of the Appendix to this petition.

Judge Mansfield concluded that since the matter of the charge against Torrillo was publicly recorded, the prosecutor had "understandably though erroneously assumed knowledge on part of defense counsel" (p. 18a, Appendix to this petition). Though he found an "uncompromising duty" on the part of the prosecutor to disclose to defense counsel prosecutions pending in the prosecutor's office against a government witness, he nevertheless rejected the defendants' request for a new trial.

The Court of Appeals took an even more stringent view of the prosecutor's failure to make disclosure. On appeal the Government conceded the admissibility of a pending prosecution as bearing on a motive to testify favorably for the Government. (See Opinion of the Court of Appeals at p. 4a of the Appendix to this petition.) Moreover, the Court recognized that this was the sort of evidence that, even if inadmissible, might have played an important role in defense preparation; equally the Court noted that the prosecutor's view of admissibility could not justify a non-disclosure without usurping both the role of defense counsel and the Trial Court, and in so doing the Court cites and quotes the language of *Griffin* v. *United States,* 183 F.2d 990, 992-993 (D.C. Cir. 1950). (Appendix to this petition, p. 4a).

The Court of Appeals further rejected the contention that the prosecutor "understandably" assumed that defense counsel knew that Torrillo was under indictment by the very United States Attorney's office conducting the prosecution of Bonanno and Notaro. The Court

rather found that the prosecution "served its narrow interest of securing a conviction at the peril of the diligent search for truth". (Appendix to this petition, p. 5a).

Further the Court found that the prosecutor's attention should have been "flagged" by persistent defense efforts to impeach Torrillo with regard to his motive to testify for the Government, and in footnote 3 rejected as self-serving the Government's suggestion that the absence of cross-examination of Torrillo about the pending indictment was a defense tactic (Appendix to this petition, p. 5a). The Court of Appeals then proceeded, while rejecting the Government's justifications of the non-disclosure, to conclude that since the non-disclosure was "negligent", the defendants had to show the materiality to the verdict of the non-disclosure. It concluded that the non-disclosed material would not have raised a reasonable doubt in the minds of the jurors. We shall return when we argue the reasons for the granting of this writ to the hiatus in terms of logic and justice which exists between the Court's analysis and its conclusion. For the moment, it seems enough to note that the word "negligent" here does not refer to the prosecutor's failure to discover the material to which defense was entitled. This was no obscure piece of information buried in a remote government file. The word "negligent" rather refers to the mental process by which the prosecutor arrived at the decision not to disclose material which was within his knowledge.

A second and closely related error raised in the court below and intertwined in its consideration was the charge of the Court concerning the mail fraud.

In part, the Court charged the jury:

"There has been evidence introduced as to whether the card was borrowed or extorted from Torrillo, as to whether Bonanno was authorized by Perrone to use it and the defendants thought they had the right to use it, and as to whether Bonanno intended to did not intend ultimately to pay the charges in excess of some $2,400 that were incurred through his use of the card.

This evidence may be considered by you in resolving the ultimate issue of whether there was a scheme or intent to defraud. *However, it is not essential for the government to prove that the card was extorted, or that the defendants were not authorized to use it, or that they did not intend to pay.* In other words, if you find beyond a reasonable doubt that they schemed to misrepresent themselves as Torrillo in order to deceive the Diners Club and establishments into furnishing goods and services that would not have been furnished if they had disclosed their true identities and that they had reason to believe that the establishments and Diners' Club would then use the mails to collect and pay the bills for the merchandise and services, *you may find that there was a scheme to defraud regardless whether the card was borrowed or extorted, regardless of whether Perrone gave the defendants authority to use the card, and regardless whether they intended ultimately to pay for the goods and services.*

If, on the other hand, you find that the defendants believed that their misrepresentations of their identity was immaterial, or that they had the right to use the card, you would find that there was no scheme to defraud.

Thus one of the ultimate issues which you are called to decide is whether there was a scheme to defraud substantially along the lines alleged." (746-766) [Emphasis Supplied]

The instructions quoted are, of course, absolutely inconsistent because in the third paragraph quoted the jury is told in the disjunctive that they would find no scheme to defraud if they found that the defendants believed either: (1) that misrepresentation of their identity was immaterial, or (2) that they had the right to use the card, while earlier in the instructions the jury was told that it was not essential for the government to prove (a) the card was extorted, (b) the defendants were authorized to use it, or (c) they did not intend to pay, and that it was immaterial whether the card was borrowed, or Perrone gave authority to use the card, or whether they intended to pay. Since from the point of view of fraud, an honest intention to pay is the equivalent of payment (See *United States* v. *Kyle*, 257 F. 2d 559, 565 (2nd Cir. 1958), these instructions amounted to telling the jury that even if Torrillo had willingly lent the card to Bonanno through Perrone and authorized him to use it and he had used it and paid for the services, and Notaro knew of these circumstances, he and Notaro would have been guilty of a mail fraud. The net effect of the instructions was to make the defendants guilty if Bonnano had ever used Torrillo's card and signed Torrillo's name. This self-contradictory charge, coming as it did after the prosecutor's inflammatory, extortion-focused summation, could not but have confused the jury. Even without that summation, it hardly provided a basis of guidance for their deliberation. In and of themselves, the instructions complained of were self-contradictory, confusing, and erroneous.

The consequences of the rule contained in the residuum of the instructions are horrific to contemplate. The rule apparently assumes that the use of the name of another, even with authority and without any inten-

tion to default on financial obligations, constitutes a mail fraud, if the other party in the transaction might not enter into it if he knew the true name. Ghost-written books sold through the mails would obviously, under this rule, constitute a mail fraud. A brief, or other legal document bearing the name of illustrious counsel, which is in fact entirely the work of another's undisclosed effort, would if served, distributed, or paid for by mail, constitute a mail fraud.*

Each of the defendant's trial counsel made a specific objection (795, 797) to the portions of the charge quoted above, and defendant Bonanno's requested instruction number 1 had addressed itself to the necessary conjunction of a fraudulent animus with the use of an assumed name. There was an understanding that each defense counsel had the benefit of the other's objections (750). Strikingly enough, while the Government's requests to charge (e.g., Government's Requests 12, 13, and 15, and Supplemental Requests unnumbered [presumably 32] and 33) went very far indeed in general language to equate fraud with nondisclosure or any situation in which a party to the transaction is or may be under a misapprehension susceptible to being corrected by the person alleged to have committed the fraud, those requested instructions did not in terms of the concrete issues of the case to be resolved by the jury, go nearly as far as the Court's actual instructions. The instructions effectively eliminated the defense of real or honestly-believed authority. It took from the jury the consideration of the critical mental issue of good-faith belief in authority to use the card on the part of Bonanno and derivatively on the part of Notaro.

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* Such a practice is of course unknown in our jurisdiction but is sometimes said to occur in other parts of the country.

The Court of Appeals found this charge substantially correct (Appendix to this petition, pp. 8a-9a). In critical part, of course, the Court's decision about the non-disclosure turns upon its conclusion that the jury may have (or if one is to be logically rigorous, must have) convicted the defendants on this part of the Government's theory of the case, but the Government, commencing with the indictment and running through the case to its summation (746), had argued that the mail fraud was based on the fact that Torrillo had been the victim of intimidation and fear when he gave his card to Perrone. The jury was presented with alternative ways of convicting the defendants, and the last alternative, set forth in the instructions just quoted, made the defendants' conduct effectively *malum prohibitum*.

REASONS FOR GRANTING THE WRIT

A. Where a United States Attorney has actual knowledge of material which is reasonably plainly helpful to the defense in preparation or trial, his failure to make disclosure to the defense should require a reversal, even in the absence of a wrongful motive to suppress such evidence or injure the defendant's rights. It is in the interests of the fair and even-handed administration of justice in the United States Courts for this Court to enunciate a clear rule for the guidance of prosecutors.

The Court of Appeals, as we have noted, made much of the fact that the prosecutor's non-disclosure was "negligent", but negligent in the matrix of the present case does not mean that the prosecutor was lacking in diligence in developing the evidence which was useful or potentially useful to the defense; it means merely that the prosecutor was not engaged in a willful act of misconduct in failing to disclose it. We wish our position to be clearly understood. We have never

charged and we do not charge now that the Assistant United States Attorney who conducted the trial set out with an evil purpose to conceal exculpatory evidence. We think however, it is a most unreasonable exaltation of the view which holds criminal trials to be a sporting contest between counsel to say that willful misconduct is the measure of the Government's duty. See: *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 145-47 (1964); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Polisi*, 416 F. 2d 573, 577 (1969). We respectfully submit that it is the impact of the conduct on the rights of the defendant which forms the correct basis for assessing its consequences. Indeed, happily, in so far as the Federal Courts are concerned, willful suppression is an unusual aberration. There is, however, a much graver and more common tendency, arising frequently from an access of prosecutorial zeal, for the Government to play it "too close to the vest", *United States* v. *McFarland*, 371 F. 2d 701, 705 (2d Cir. 1967). Such conduct, in the words of the Court of Appeals in this case, serves the Government's "narrow interest of securing a conviction at the peril of a diligent search for truth" (Appendix to this petition, p. 5a). Where, as in this case, the discovery of the Government's concealment is promptly made and the countervailing interest in the finality of criminal judgments which the Government may find difficult or impossible to retry has not come into play, there is no sound argument against holding the Government to a high standard. See the Opinion of Chief Justice Burger, then Circuit Judge Burger, in *Brodie* v. *United States*, 295 F. 2d 157, 159 (D.C. Cir. 1961). The logic of the Court of Appeals, we submit, does not bear scrutiny. While it may be true that if the jury proceeded on the

theory that it was convicting for the mere use of Torrillo's name Torrillo's credibility would not come into critical consideration vis-a-vis the acceptance of the card by Diners' Club establishments, it is also plainly true that the Government put its primary cutting edge on the extortion of the card from Torrillo. A fair consideration of the defendant's contentions that they believed themselves authorized to use Torrillo's card necessarily would have been affected by a reasonably based argument that Torrillo, who was then under indictment by the very United States Attorney's office conducting the prosecution, was seeking to curry favor with the Government. Even beyond that, however, the question of any cheating amimus must well have turned, in part at least, on the jury's conclusion as to whether Torrillo had willingly lent his credit to the defendants or was the victim of a wrongful scheme on their part. We note in passing that the Court of Appeals, and we think correctly, gave no separate treatment to the perjury counts against Bonnano which were inextricably related to the mail fraud and arose from his testimony before the Grand Jury seeking to exculpate himself in connection with his use of the card. The rules which this Court shapes to regulate the adversary conduct of prosecutors, and defense counsel as well, are not ends in themselves, but rather means to achieve a fair adjudication based on a diligent search for the truth in which the prosecutor has a very special role in terms of his power and resources. Left undisturbed the decision below will lend itself to a narrow and hypertechnical construction by prosecutors of their duty. A grant of certiorari and a full review of this case will, we submit, not only result in the overturning of the unjust conviction of these defendants and the granting of a new and fair trial to them, but will also

permit this Court to mark out clearly the now all too shadowy duty of prosecutors to disclose favorable evidence to the defense. The present decision leaves affirmative misconduct as the measure of that duty. We think that the Constitution requires more and that public confidence in the administration of justice deserves more.

B. The instruction under which the defendants were convicted and which was approved by the Court of Appeals permitted, indeed required, the jury to find the defendants guilty, even absent a dishonest or cheating intent, contrary to the well-established rule of this Court that the mental element of a crime must be determined by the jury.

We will not reiterate here what we said above in our Statement of the case about the charge which Judge Mansfield gave to the jury. It is undoubtedly true that in crimes involving a fraudulent animus or some other mental element, the prosecution has a difficult burden. That burden, however, cannot be taken from the prosecution's hands or the jury's consideration. We respectfully submit that to permit the decision of the Court of Appeals to stand not only abridges the principles set forth in *United States* v. *Kyle,* 257 F. 2d 559, 565 (2d. Cir. 1958), but sets at naught the effectiveness of this Court's decision in *Morrisette* v. *United States,* 342 U.S. 246, 274, 276 (1952). We recognize that even if the decision below is erroneous, it would be unseemly for us simply to ask this Court to correct a wrong statutory construction of a Court of Appeals. We think, however, that where that wrong construction involves so important a statute as the mail fraud statute and trenches upon the jury's constitutional function, it is deserving of this Court's consideration and determination.

CONCLUSION

FOR THE REASONS ABOVE A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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